

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CALIFORNIA ASSOCIATION OF
REALTORS,

Plaintiff and Respondent,

v.

DAVID BARRY,

Defendant and Appellant,

D048441

(Super. Ct. No. GIC854262)

APPEAL from an order of the Superior Court of San Diego County, Jay M.

Bloom, Judge. Affirmed.

The defendant in this malicious prosecution action appeals from an order denying a motion to strike under the provisions of the anti-SLAPP statute, Code of Civil Procedure¹ 425.16 et seq. We affirm.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

The defendant's underlying antitrust action had not only been dismissed, but the claims raised in that action had themselves been the subject of still earlier unsuccessful litigation. Given these circumstances, in which the defendant filed a complaint based on claims which had been previously rejected, the plaintiff established a prima facie case of favorable termination, lack of probable cause and malice. Thus, although the plaintiff's malicious prosecution action is covered by the anti-SLAPP statute, the plaintiff met its burden of demonstrating a probability it will prevail in this action.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation is another chapter in defendant and appellant David Barry's² lengthy efforts to prosecute allegations that participants in the San Diego County real estate market have violated antitrust laws by misusing their power over the Multiple Listing Service (MLS) operated by Sandicor, Inc.

In 1998 Barry, acting as counsel for Arleen Freeman and a putative class of real estate agents, filed an action in Superior Court, *Freeman I*, alleging the San Diego Association of Realtors and Sandicor, Inc., violated state antitrust laws by charging excessive fees for access to the San Diego County MLS and restricting the plaintiffs' ability to participate in the MLS on the same basis as individual real estate associations. The trial court sustained the defendants' demurrer to the *Freeman I* complaint without leave to amend and on appeal we affirmed. (See *Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 182-183.)

² All references to Barry include defendant and appellant Barry & Associates.

Shortly after *Freeman I* was dismissed by the superior court, Barry, acting as counsel for Freeman and two additional plaintiffs, filed *Freeman II* in the district court. *Freeman II* alleged Sandicor, the San Diego Association of Realtors, a number of smaller realtor associations, and, most significantly for our purposes, the California Association of Realtors (CAR) had violated sections 1 and 2 of the Sherman Act. The complaint alleged the defendants had unlawfully fixed the price of access to the MLS and had engaged in unlawful tying, group boycott and monopoly practices in operation of the MLS. The *Freeman II* plaintiffs alleged CAR was liable because it had facilitated and encouraged the creation of Sandicor as a means of avoiding state and federal antitrust laws, provided legal advice to the defendants, and financed defense costs incurred in both *Freeman I* and *Freeman II*.

During the course of *Freeman II*, the plaintiffs propounded discovery on the defendants. In response to portions of the discovery requests, the *Freeman II* defendants willfully failed to produce documents which disclosed the existence of an alternative pricing schedule known as IntelliQuick. Barry successfully moved to reopen discovery and impose substantial monetary sanctions on the defendants. Nonetheless, thereafter the district court granted all the defendants' motion for summary judgment. On appeal the Freeman plaintiffs argued that, in addition to the financial and litigation support it provided the other defendants, CAR's participation in the discovery misconduct made CAR liable under the antitrust laws. Notwithstanding this contention, the Court of Appeals affirmed as to CAR, stating: "The California Association of Realtors isn't a party to any of the offending agreements, but plaintiffs allege that CAR lawyers

encouraged the associations' antitrust violations. Plaintiffs have failed to turn up any evidence to support this theory. There is some evidence suggesting that CAR encouraged a corporate form for Sandicor, but this doesn't show that CAR encouraged the associations to fix support fees. A CAR attorney did opine that fixed support fees were legal. But nothing indicates that she recommended the arrangement, and dispassionate legal advice is not an antitrust violation. [Citation.] Finally, plaintiffs argue that CAR is violating antitrust laws by financing the defense of this lawsuit. CAR's financial support certainly explains plaintiffs' desire to sue it, but it's hardly illegal." (*Freeman v. San Diego Ass'n of Realtors* (9th Cir. 2003) 322 F.3d 1133, 1156.) As to the other defendants, the court reversed. The court also affirmed the discovery sanctions imposed by the trial court.

After the Court of Appeals opinion in *Freeman II* was filed, but before its remittitur issued, Barry filed another antitrust action in the district court, *Freeman III*. *Freeman III* alleged CAR, its attorney and others engaged in a conspiracy to conceal the existence of IntelliQuick during the course of *Freeman II* and were therefore liable for damages in the amount of \$24 million incurred by the plaintiffs from January 1, 1994, to the date of the complaint.

The district court dismissed *Freeman III* on multiple grounds. As to CAR, the district court found discovery misconduct was not the type of harm covered by the antitrust laws, the plaintiffs could not show the discovery violations caused the injuries they alleged, and because they had been awarded sanctions for the violations, their claims were barred by res judicata. The district court found the attorney defendants were

protected by the *Noerr-Pennington* doctrine, which in general insulates petitioning activity from antitrust liability. (See *Freeman v. Lasky, Haas & Cohler* (9th Cir. 2005) 410 F.3d 1180, 1183.) Without reaching any other issue, the Court of Appeals found all the claims asserted in *Freeman III* were barred by the *Noerr-Pennington* doctrine. (*Ibid.*)

In September 2005, after the dismissal of *Freeman III* was final, CAR filed the instant malicious prosecution action against Barry, his law firm and Freeman. CAR alleged Barry and Freeman filed *Freeman III* without probable cause and with malice. In response, Barry and Freeman filed motions to strike under section 425.16. The trial court denied the motion. The trial court found that although Barry and Freeman were engaged in free speech activity within the meaning of section 425.16, subdivision (e)(1)&(3), the trial court found CAR had demonstrated a probability of prevailing on its claim. Barry filed a timely notice of appeal.

DISCUSSION

I

"Code of Civil Procedure section 425.16, the anti-SLAPP statute, provides in relevant part: 'A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' [Citation.] Under this statute, the party moving to strike a cause of action has the initial burden to show that the cause of action 'aris [es] from [an] act . . . in furtherance of the [moving party's] right of petition

or free speech.' [Citations.] Once that burden is met, the burden shifts to the opposing party to demonstrate the 'probability that the plaintiff will prevail on the claim.'

[Citations.] 'To satisfy this prong, the plaintiff must "state[] and substantiate[] a legally sufficient claim." [Citation.] "Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" [Citation.]' [Citation.]" (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 964-965.)

Here, as in *Zamos v. Stroud*, the parties agree plaintiff's malicious prosecution action arises from acts in furtherance of defendant's right of petition or free speech. "Thus, the issue is whether plaintiffs presented evidence in opposition to defendants' anti-SLAPP motion that, if believed by the trier of fact, was sufficient to support a judgment in plaintiffs' favor. Whether plaintiffs have established a prima facie case is a question of law. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (Wilson) ["In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant ([Code Civ. Proc.], § 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim'.])" (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 765.)

II

"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].' [Citation]." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.)

A. *Favorable Termination*

"In order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit." (*Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1814.) A termination is on the merits where a case has been dismissed because the underlying conduct is privileged under Civil Code section 47, subdivision 2. (*Berman v. RCA Auto Corp.* (1986) 177 Cal.App.3d 321, 325; see also *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 347.) "[W]hether a termination tends to indicate the innocence of the defendant depends on whether the manner of termination reflects on the merits. . . . In this instance the termination reflects the opinion of the Legislature that the action lacks merit because the protection of the right of an individual's access to the courts outweighs an individual's right to a civil remedy for harm resulting from misrepresentations made at a judicial proceeding. The fact that this is a general assessment of suits of this type rather than the individual assessment of a particular case does not mean it is not a reflection on the merits of the action. The

Legislature has in effect said that suits based on privileged statements are suits which are without merit." (*Berman v. RCA Auto Corp.*, *supra*, 177 Cal.App.3d at p. 325.)

In light of *Berman v. RCA Auto Corp.*, we reject Barry's contention that, because the Court of Appeals found all the claims in *Freeman III* were subject to *Noerr-Pennington* immunity, *Freeman III* was not terminated on the merits. *Noerr-Pennington* immunity is based upon the right of the people to petition all three branches of government and reflects a determination by the Supreme Court in enacting the antitrust laws Congress did not intend to infringe upon that right. (*Freeman v. Lasky, Haas & Cohler*, *supra*, 410 F.3d at p. 1183.) Thus, in an important respect *Noerr-Pennington* immunity is in reality an interpretation of the scope of the antitrust laws, and like the absolute privilege, a legislative determination that a particular class of claims lacks merit. Accordingly, termination of *Freeman III* under the *Noerr-Pennington* doctrine was, like a termination under the absolute privilege, a termination on the merits.

B. Probable Cause

In *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382, the court set forth the liberal probable cause standard governing malicious prosecution actions: "Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present no probable cause." (Quoted with approval *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743.) This liberal

standard reflects "the important public policy of avoiding the chilling of novel or debatable legal claims." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885 (*Sheldon Appel*); see also *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

Here, any reasonable attorney would have recognized the claims asserted in *Freeman III* were fatally defective on a whole host of grounds. First, the record shows in *Freeman II* the Court of Appeals had before it the antitrust plaintiffs' contention CAR's legal advice and support of the other defendants gave rise to antitrust liability. In particular, the Court of Appeals had before it not only the merits of the defendants' discovery violation, but the antitrust plaintiff's contention CAR's participation in the discovery violation made it liable under the antitrust laws. In affirming the judgment in CAR's favor, the Court of Appeals in *Freeman II* rejected these theories.

We also note Barry has not been able to cite in the trial court or on appeal any case which has held discovery violations in an antitrust case are themselves restraints of trade within the meaning of the antitrust laws. Although in some instances prior litigation activity might give rise to separate tort liability, as CAR points out those case are restricted to cases where the prior litigation activity violated specific statutory duties or limitations. For instance, in *Theofel v. Farey Jones* (9th Cir. 2003) 341 F.3d 978, 983, the court found, notwithstanding *Noerr-Pennington*, a defendant who had served an overbroad and invalid civil subpoena was liable under a specific federal statute protecting electronic privacy. Similarly, in light of specific language permitting liability under the federal RICO statute to be imposed based upon prior litigation activity, the court in *Living Designs, Inc. v. E.I. Dupont De Nemours* (9th Cir. 2005) 431 F.3d 353, 365,

permitted litigants to pursue a claim based upon what amounted to settlement fraud in prior litigation. No reasonable attorney, conversant on any level with the holding in *Freeman II*, would construe these cases as in any manner supporting the notion that prior litigation conduct, including discovery abuses, itself amounts to a restraint on trade.

Casting further doubt on the claims asserted in *Freeman III*, is the fact the discovery abuses asserted in *Freeman III* were subject to substantial sanctions in *Freeman II*. Any reasonable lawyer would recognize those sanctions presumably remedied any injury the antitrust plaintiffs suffered.

Finally, we note the existence of *Noerr-Pennington* immunity. As the Court of Appeals in *Freeman III* held, *Noerr-Pennington* immunity defeated all of the claims asserted in *Freeman III*.

In the end, it is the volume of fatal defects in the claims asserted in *Freeman III* which bring it within that narrow class of cases which all reasonable lawyers would agree lack merit. *Freeman III* alleged a substantive theory which had been previously and recently rejected and for which no authority existed; *Freeman III* alleged a claim for discovery injury which had been previously adjudicated and compensated; *Freeman III* alleged a claim that was plainly subject to *Noerr-Pennington* immunity. Given this record, CAR could show that in prosecuting *Freeman III* Barry lacked probable cause.

C. *Malice*

As Barry points out, "[m]erely because the prior action lacked legal tenability, as measured objectively . . . without more, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective

malicious state of mind.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743.) Here, however, there is a great deal more which suggests malice towards CAR.

As employed in relation to the tort of malicious prosecution, malice includes not only hostility or ill will, but an intent to extract some advantage or settlement unrelated to the merits of the claim. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383.) Here, such a collateral purpose is reflected throughout the history of these proceedings. The record is clear CAR has provided a great deal of the wherewithal the other antitrust defendants have employed in defending the antitrust claims. From this circumstance a reasonable trier of fact could infer the principal purpose of *Freeman III* was to consume CAR resources that might otherwise be available to other antitrust defendants or compel a settlement from all the defendants, including CAR. This inference of a collateral purpose would of course be supported by the complete lack of merit in *Freeman III*. (See *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 499.)

CONCLUSION

CAR was able to show a probability of success on each element of its malicious prosecution claim. Accordingly, the trial court did not err in denying Barry's motion to strike.

Order affirmed. Respondent to recover its costs of appeal.

BENKE, Acting P.J.

WE CONCUR:

NARES, J.

AARON, J.